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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 737

JAMES A. YATES,

Petitioner,

vs.

EDWARD EALE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

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No. 737

JAMES A. YATES,

Petitioner,

vs.

EDWARD BALL,

Respondent

PETITION FOR CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner, James A. Yates, respectfully represents that:

I

Summary and Short Statement of the Matter Involved

On June 21, 1933, petitioner, James A. Yates, as trustee, brought an action at law in a Florida state court against respondent, Edward Ball, on an oral contract to protect and pay a second mortgage on real property that Ball was buy-

ing.[1] When the case came on for trial the judge directed a verdict for Ball at the conclusion of the plaintiff's evidence. Yates appealed. The Florida Supreme Court reversed. It said the case was one for a jury (132 Fla. 132, 181 So. 341).[2]

The case went back for a second trial. The plaintiff put in the same evidence that he did the first time. The defendant put on his evidence, which consisted principally of a denial of the authority of the agent who acted for him in making the contract. The judge sent the case to the jury. The jury found for Yates in the sum of $195,000.00. A motion for a new trial was denied. Ball appealed. The Florida Supreme Court again reversed. It gave no understandable reason. 145 Fla. 537, 200 So. 701.[3]

The case went back for a third trial. The plaintiff amended his declaration as he had been expressly authorized to do, so that there could be no possible question of variance. He again put in the same evidence that he had on the two previous occasions. The defendant introduced the same evidence that he introduced on the second trial. The judge again sent the case to the jury. The jury again found for

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[1] This suit was really a continuation of certain chancery litigation between the same parties which had been to the Florida Supreme Court several times, on one of which occasions it was squarely held that the oral contract was not a promise to pay the debt of another within the statute of frauds. (*Yates* v. *St. Johns Beach Development Co.*, 118 Fla. 788, 160 So. 197.) Such oral contracts have always been held to be valid in Florida. (*Herrin* v. *Abbe* (1908), 55 Fla. 769, 46 So. 183, 18 L.R.A. N. S. 907.) The rule in Florida is the same as it is in this Court. (*Davis* v. *Patrick*, 141 U. S. 479.)

[2] Here the court again held that the statute of frauds had no application. This time—referring to the 1-year provision—it said: "The very predicate for application of the statute of frauds, a loose or casual statement galvanized with fraud, is absent in this case."

[3] The circuit judge, on the re-trial, said he didn't understand it and it was of no help to him. The court now says the language was "inadvertent." 158 Fla. 521, 528, 29 So. 2d 729, 733.

Yates for $243,041.68.[4] A motion for a new trial was again denied. Ball again appealed. The Florida Supreme Court again reversed.[5] *Ball* v. *Yates*, 158 Fla. 521, 29 So. 2d 729.

On the third appeal a majority of the court said that Yates had no cause of action in the first place, and no credible evidence to support it in the second place, and that the case never should have been submitted to a jury, after all the evidence was in, in the third place. It directed the lower court, when the mandate went down, to summon Yates to appear and show if he had any more evidence and, if not, to dismiss his case. The authority for this extraordinary procedure does not appear.

A petition for rehearing was thereupon seasonably filed and later denied. 158 Fla. 537, 29 So. 2d 737.

Based upon facts that were discovered after this decision, petitioner filed a supplemental petition for rehearing and a suggestion of disqualification under the statute[6] of Justices Buford and Adams. Briefly, the facts are these:

Justice Buford had made an agreement with the St. Joe Paper Company, the principal operating company of the duPont interests in Florida (of which the respondent, Ball,[7] is president and controlling director) covering more than 18,000 acres of land in Florida, for the purpose of mining and operating oil, gas and other minerals for the term of 10 years and as long thereafter as operations are in actual progress. The lease was signed by Ball on behalf of his company. By the terms of this instrument Justice Buford

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[4] This was the same verdict as on the second trial, the difference being in the accrued interest.

[5] The opinion was written by Circuit Judge Barns, concurred in by Justices Buford, Brown, Thomas and Adams; Chief Justice Chapman and Justice Terrell dissenting.

[6] Florida Statutes, 1941, Secs. 38.02, 38.10.

[7] The respondent, Ball, is trustee of the duPont estate.

and Ball's company became joint adventurers and profit-sharers in these operations as it was agreed that the yield therefrom would be divided between them on a royalty basis. Justice Buford did not deny the making of this contract but said that it did not prevent him from standing fairly and impartially between the parties. However, he did not do so.

Justice Adams, after the judgment appealed from was rendered and before the case was reached for consideration by the Supreme Court, borrowed $80,000.00 from the Florida National Bank of Jacksonville.[8] He states in his response to the suggestion of disqualification that the indebtedness was paid before the case was heard. One thing is certain—he didn't pay it out of his official salary of $9,000.00 per annum. However, before the ink was dry on the opinion and *before the time prescribed by the rules for filing a petition for rehearing had expired,* Justice Adams borrowed another $30,000.00 from the Florida Bank at Fort Pierce.[8] This indebtedness had not been paid and it is not so claimed. Justice Adams only said that the debt was amply secured and that he, too, stood fairly and impartially between the parties. His impartiality, like Justice Buford's, was manifested by lip service.

The two justices declined to recuse themselves and the court overruled the suggestion of disqualification as insufficient in law and in fact. 158 Fla. 530, 29 So. 2d 733. It denied the petition for rehearing.

The decision was by a divided court, 5 to 2. If the two justices charged with prejudice had voted with the petitioner, the decision would have been in his favor, 4 to 3.

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[8] These two banks, together with sixteen others located in various points in Florida from Pensacola to Key West, are owned and controlled by the duPont estate, of which the respondent, Ball, is the dominating and controlling trustee. All of these institutions are one hundred percent under Ball's control, and loans the size of these can be made only with his express approval.

It probably would have been unanimous for reasons which will be pointed out.

The petitioner made an effort to have this court review the case at that time but it declined to do so (332 U. S. 774). He felt that the judgment was final to all intents and purposes, although it subsequently developed that this was not the case.

When the mandate went down to the court of original jurisdiction the respondent moved for an order to show cause why final judgment should not be entered for him (R. 9-12). The court issued the rule (R. 13). In response thereto the petitioner challenged the power of the Florida Supreme Court to direct such a course but added that he had discovered other evidence available which would add substantially to the strength of his case (R. 14, 59). He was required to set out the substance of the additional evidence which the court held insufficient and entered final judgment for the respondent (R. 67-70).

Petitioner again appealed to the Florida Supreme Court. Justice Adams, upon petitioner's suggestion, voluntarily recused himself, but Justice Barns declined to do so and an affidavit of disqualification was filed against him, which the court denied (R. 73-85).

Thereupon petitioner made application to recall the mandate and affirm the judgment of March 8, 1945, which was likewise denied (R. 86-96, 102). The court then in a hearing on the merits, by a per curiam opinion concurred in by four justices, with three dissenting, affirmed the judgment of the Circuit Court of Duval County dismissing the plaintiff's action (R. 102). The decision is not yet reported. It is to review this final judgment that the writ of certiorari is sought.

On January 13, 1950, the Florida Supreme Court denied the petitioner's application for rehearing and subsequently

granted a stay of the mandate for ninety days to enable petitioner to apply to this court for certiorari (R. 111, 112).

Whether the judgment was final before or not it is certainly final now.

II

Statement Particularly Disclosing the Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This court has jurisdiction to review the judgment in question under Section 1257 of the Judicial Code (Title 28, Sec. 1257, U. S. Code), in that it is the final judgment of the highest court of the state in which a decision could be had, and where a right, privilege or immunity was specially set up and claimed by the petitioner under the Constitution as (a) a denial of due process of law and of the equal protection of the laws; (b) a denial of the right of trial by jury secured under the seventh amendment;[9] (c) a denial of the right of trial by jury secured under the Florida Constitution;[10] and (d) obstructing justice under the Civil Rights Act (Title 8, Sec. 47 (2), U. S. Code).

III

The Questions Presented

1. Where a state court, on appeal from a judgment directing a verdict for the defendant in an action at law, has held that the plaintiff's evidence proved the essential

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[9] While the seventh amendment originally was applicable only to courts of the United States, we shall endeavor to show that the fourteenth amendment made the first eight amendments applicable to the states.

[10] Florida was not one of the thirteen original states. It was admitted as a state by Acts of Congress hereinafter cited, on the express condition that it adopt a constitution setting up a republican form of government in conformity with the principles contained in the Constitution of the United States and adopting a bill of rights for the same.

elements of the contract sued on without material variance, that there was ample showing of the authority of the defendant's agent to act for him, and that the issue was one for a jury to determine, thus establishing the law of the case, may it hold, consistently with the due process and equal protection clauses, after two juries subsequently rendered verdicts in the plaintiff's favor, that the same evidence is insufficient to establish a cause of action and order the plaintiff nonsuited?

2. Where a state court has held, on an appeal from a judgment on a directed verdict for the defendant, that the plaintiff's evidence was sufficient to entitle him to go to the jury, and thereafter in two successive trials the jury returns a verdict for the plaintiff, does the reversal of the plaintiff's judgment by the state court of last resort with directions to dismiss the case invade the province of the jury and deny the plaintiff the rights secured to him by the seventh amendment?

3. Where a state, not being one of the original thirteen, was authorized to be admitted to the Union on the express condition that it adopt a constitution setting up a republican form of government and "in conformity to the principles contained in the Constitution of the United States" and such constitution was expressly approved by the Congress when the state was admitted, was the effect to render obligatory the maintenance of these approved constitutional provisions so that a violation of them infringes a Federal right?

4. Does due process of law insure a litigant a fair trial by an impartial court, and is he denied due process when it is shown that two of the judges of a state court of last resort have had financial transactions with his adversary of such a nature and of such magnitude as to justify the

litigant's fear of their impartiality, especially so when the majority required to reverse the judgment in his favor necessarily included the two judges whose impartiality was challenged?

5. Does the conduct of respondent, Ball, in his transactions with two of the justices fall within the provisions of the Civil Rights Act (Title 8, Section 47 (2), U. S. Code), defining obstructing justice "if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws"?

IV

Reasons Relied On for the Allowance of the Writ

The case involves public questions hitherto not directly decided by this court:

1. Whether or not the fourteenth amendment makes the seventh amendment applicable to state action.

2. Whether or not the admission of a state into the Union upon the condition that it submit for approval a constitution setting up a republican form of government and containing a bill of rights, creates an enforceable Federal right.

3. Whether or not due process of law is denied to a litigant by the action of a state court in compelling him to submit his cause to a tribunal consisting of judges disqualified by reason of prejudice in favor of his adversary.

4. Whether this violates the Civil Rights Act.

5. Whether or not this court is authorized to review the judgment of a state court of last resort reversing two jury verdicts after it had held that the plaintiff's case was sufficient to entitle him to a jury trial.

6. Whether or not this court is authorized to review the judgment of the highest court of a state consisting of disqualified justices as a denial of due process under the fourteenth amendment.

The premises considered, your petitioner prays that a writ of certiorari may be issued to the Supreme Court of Florida requiring it to transmit to this court under its official seal a true and correct copy of the record of its judgment herein for such further relief as, upon consideration thereof, this court shall find the petitioner is entitled to receive.

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HARRY T. GRAY,
Attorneys for Petitioner.

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Supreme Court of the United States

No. _____

JAMES A. YATES, PETITIONER,

VS.

EDWARD BALL, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The sheer statement of this case is the strongest reason that the petitioner can advance to this Court for the allowance of the writ. It is simply inconceivable that the court of last resort of a sovereign state did what the Florida court did in this case. When courts do things like the Florida court did here, it is small wonder that the people lose confidence in them.

QUESTIONS NUMBERS 1, 4 AND 5.

Denial of Due Process—Civil Rights.

It became obvious that sinister influences were at work in this case when, on the second appeal the Court reversed a judgment for plaintiff on a jury verdict after

having held, on the first appeal, that the case was one for a jury to decide.

This is so because the Court gave no understandable reason for so doing. It was a *per curiam* opinion and when an examination of the Court's original files was made for the purpose of ascertaining who its author was, *it could not be found.* It is more so because Justice Buford undertook, in an opinion that failed to secure concurrence of a majority, to repudiate practically everything that had been decided on the first appeal.

As time passed indications of insidious activity accumulated. Strange rulings were made. Note the concluding paragraphs of the last opinion about the Court's reversal of its rulings on motions to strike the brief. These were followed by sudden and unexplained efforts to hasten the final hearing of a case where dilatory tactics had been the consistent policy of the defense for fifteen years. The case was advanced on the calendar of oral arguments and one of the concurring justices resigned *the next day* after the decision was rendered under the judicial retirement act. He had been eligible for retirement for more than a year.

Petitioner and his counsel had suspected for some time that the Court was not functioning as a free agent. These suspicions at first could not be verified. After the third decision—totally inexplicable on the basis of honest, unprejudiced judicial consideration having due regard for established precedents—he became convinced that something was wrong. Shortly rumors began to leak out that some of the members of the Court had been having some financial dealings with the respondent and his banks and holding companies. Petitioner sent abstractors to certain counties of the state and found that

(a) Justice Buford, between the second and third appeals, had been given an oil lease by Ball's principal holding company, on some 18,000 acres of land, for ten years, *on a profit sharing basis.*

(b) Justice Adams, *after the judgment appealed from was rendered,* borrowed $80,000.00 from Ball's principal bank, of which both *his counsel in this case were and still are directors.* The loan on its face was for one year. *Before it was due* a purported satisfaction was put on record. *Five days* after the decision was rendered and *before the time for filing petition for rehearing had expired* Justice Adams borrowed another $30,000.00 from another of Ball's chain of eighteen banks. It isn't claimed that this loan has been paid, only that it is "amply secured."

The lengths to which the Supreme Court of Florida went in its decision on the third appeal of this case, in order to relieve from the burden of two jury verdicts the man with whom two of its members were financially involved, compel a somewhat more detailed review of the case than properly could be put in the petition for certiorari.

SHORT RESUME' OF THE CASE.

First Appeal.

As stated, upon the first trial the circuit judge directed a verdict for the defendant at the close of the plaintiff's testimony. Apparently he thought that the plaintiff's evidence did not establish a cause of action. The plaintiff appealed. The Florida Supreme Court reversed and held squarely that the plaintiff's evidence did establish his case and it should have been submitted to the jury. *Yates* v. *Ball,* (1938) 132 Fla. 132, 181 So. 341.

Second Appeal.

When the case went back for the second trial the plaintiff put in substantially the same evidence that he introduced on the first trial and which the Court had held was sufficient and entitled him to go to the jury. The defendant then put on his evidence. This evidence consisted principally of a denial of the authority of his agent to make the contract. Indeed, he could do little else because he took the position that he had no knowledge of the contract until long after it was made. In this connection it might be observed that there was no doubt whatsoever that the contract was made, because both the agent of the plaintiff, who acted for him, and the agent of the defendant, who acted for him, testified on behalf of the plaintiff and each asserted that the contract as set out in the declaration was made.

The defendant's denial of his agent's authority did not weaken the plaintiff's evidence, which had been held to be sufficient. It produced only a factual issue that was the jury's province to try. The jury believed the plaintiff's witnesses and found a verdict for him. In this it may have been influenced somewhat by the fact that there was much evidence of ratification, including Ball's admission that he had made three semi-annual interest payments not only on the plaintiff's second mortgage, but also on the first mortgage against which he had agreed to protect the plaintiff. In short, he put some seventy odd thousand dollars in the property over a period of a year and a half. He admits that he was speculating with it. The last interest payment he made was in June, 1929, and the next one was due December, 1929. In the meantime, the memorable stock market crash occurred, rich men were frightened out of their wits, capital was scurrying to cover, and Ball simply repudiated his contract.

The circuit judge declined to disturb the jury's verdict. Ball appealed. In an opinion in which we insist no reason was given, the Supreme Court reversed the circuit judge for doing the very thing that it reversed him for not doing on the first appeal, namely, submitting the case to the jury. *Ball* v. *Yates,* (1940) 145 Fla. 537, 200 So. 692.

Third Appeal.

The plaintiff accepted the mandate of the Court with good grace. He amended his declaration and submitted his case to a third jury.[1] His evidence was the same as before. The defendant put on his proof, which was the same as on the second trial. The jury found for the plaintiff. The trial judge refused to disturb the verdict. Ball appealed and the Florida Supreme Court again reversed.

FLAGRANT CHARACTER OF THIRD DECISION.

Courts have no more right to play fast and loose with litigants than litigants have to play fast and loose with the Courts. If the evidence adduced by plaintiff in an action is sufficient on one trial, the same evidence is sufficient on every trial thereafter. It can never become insufficient. Of course, there are cases where some affirmative defense, such as limitations, is established which require a directed verdict, but all such defenses had been ruled out.

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[1]The third opinion says that the Court held on the second appeal that the evidence was insufficient to support the verdict and was intended to dispose of the case. 158 Fla. 521, 29 So. 2d 729. *That is not true.* If it were, the Court should have said so. See Judge Terrell's dissent. 158 Fla. 540, 29 So. 2d 739. Why did the Court expressly grant plaintiff leave to amend his declaration if it intended to dispose of the case? 145 Fla. 537, 200 So. 692.

To make it clear how the Supreme Court of Florida has in effect repudiated almost every material ruling on the first appeal, we set forth in parallel columns excerpts from the two opinions on the principal points in the case.

Yates v. *Ball*, (decided Oct. 13, 1937) 132 Fla. 132, 181 So. 431.	*Ball* v. *Yates*, (decided Nov. 29, 1946) 158 Fla. 521, 29 So. 2d 729.
Suttles' Agency.	
"There was ample showing of Suttles' authority to act for Ball.	"We are of the opinion that the evidence fails to establish facts sufficient to permit an inference that Suttles was the authorized agent of Ball.
"He (Ball) must have considered the agreement perfected and closed else he would not have expended so much in compliance with its terms on his part.	"And likewise it is not sufficient to establish ratification.
The Making of the Contract.	
"The evidence shows that Suttles, as the authorized representative of Ball, negotiated with the second mortgage bondholders and made the agreement between them and Ball on which this action is grounded.	"The evidence fails to support an enforcible contract between Ball and Marks prior to June 1, 1928, and likewise the evidence fails to establish ratification subsequent thereto."

"Much of this evidence is confusing, some of it is immaterial, but our conclusion is that the essential elements of the contract declared on were proven, that Ball accepted its terms and that there was no material variance between the proof and the agreement."

These statements cannot be reconciled. One says "white," the other says "black." Specious reasons tend only to emphasize them.

In order to explain why the Court felt warranted on the third appeal in overturning the verdicts of two juries and the settled law of the case, as decided in the first appeal, Mr. Justice Barns,[2] after referring to his interpretation of the second appeal, makes this amazing statement:

> "If there be any conflict between the law of the case as established by the first appeal with the law of the case as established by the second appeal then in that event *the latter will control over the first*" (Italics ours).

It is amazing for the following reasons:

(1) No authority is cited for it and none can be found. Judge Barns invented it. He conjured it up to defend an indefensible position.

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[2]Judge Barns was in no position to construe the Court's meaning on the second appeal. He was not a member of the Court at that time. He was a circuit judge in Miami. See *Pennekamp* v. *Florida*, 328 U. S. 331.

(2) It is in direct conflict with the recent opinion of the Court, by Mr. Justice Thomas,[3] in *Provident Life & Accident Insurance Company* v. *Mathers,* 157 Fla. 661, 26 So. 2d 814, in which he said that the law of the case was settled on the *first* appearance of an action in the appellate court.

(3) To so hold ignores the reason for "the law of the case" and goes to its very foundation.

THE LAW OF THE CASE.

The rule is one of expediency. It is designed to terminate litigation. In the old cases it is pointed out that were it not for this rule the lower court would be free to decide questions as it saw fit. It could then engage in a game of battledore and shuttlecock with the appellate court. Litigants could gamble freely on changes in the personnel of the court. The result would be interminable litigation. If the law announced by Mr. Justice Barns is correct the whole purpose of the rule is defeated. This is so because when the case goes back to the lower court it may decide questions already adjudicated as it will. Then on the second appeal the appellate court may say that perhaps it was mistaken in its first decision and the lower court was correct after all. Then it could reverse itself on the third appeal and so on *ad infinitum.* If the rule is to be enforced it must bind everybody—parties, counsel, lower courts and appellate courts—and the individual judges thereof—alike. The appellate court in the same case cannot render a second decision in conflict with its first. If it does the second must be held for naught.

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[3]And yet Judge Thomas concurred in this opinion! How can Judge Thomas subscribe to both?

In short, after the law of the case is announced on the first appeal, neither the lower court nor the appellate court will be heard thereafter to hold any point contrariwise. Otherwise we strike at the roots of the rule and deal it a blow that will ultimately bring about its disuse.

WHAT THE COURT REALLY INTENDED ON SECOND APPEAL.

Judge Terrell, who wrote the opinion on the first appeal, has this to say with reference to the second appeal:

> "I do not understand the reversal in second appeal to have been on the ground that the evidence would not support an affirmative verdict under any circumstances. I thought that the interests of all parties under the circumstances would be better served by letting another jury pass on the evidence. That has been done and I think the verdict and judgment should stand." 158 Fla. 541, 29 So. 2d 739.[4]

This Court has declared:

> "It is the settled law of this court, *as of others,* that whatever has been decided on one appeal or

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[4]The Florida Court has done this before. *Ellis* v. *State,* (1923) 86 Fla. 155, 97 So. 285; *Foster* v. *Thornton,* (1935) 119 Fla. 49, 160 So. 490. But Judge Barns (who, as stated, was not a member of the Court at the time) says that the second reversal was not based on any supposed variance between the pleadings and the proof, and if the language of the opinion be taken literally and so construed, it was "inadvertent." His statement is not in harmony with the record as pointed out in the petition for rehearing. Courts ought not to use language inadvertently. It affords little comfort to people of small means who carry on expensive law suits in the expectation that the Court has said what it meant and that the verdict of a jury on evidence held to be legally sufficient will be upheld.

writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. *The first decision has become the settled law of the case*" (Emphasis supplied).

Thompson v. *Maxwell Land Grant & R. Company*, (1897) 168 U. S. 451.

FLORIDA SUPREME COURT HAD NO POWER TO DEPART FROM LAW OF THE CASE.

As this Court said, that is the law in other courts as well and has always been the law in Florida. Indeed, the Florida Supreme Court, before this decision, had held that it was *without authority* to review or reverse what it had heretofore decided as the law of the case even if it were so inclined. *Family Loan Company* v. *Smetal Corporation*, (1936) 123 Fla. 900, 169 So. 48.

Neither Mr. Justice Barns, of the Florida Supreme Court, nor the respondent's counsel in this case can find any case in any English-speaking jurisdiction to support his assertion that "if there be any conflict between the law of the case as established by the first appeal with the law of the case as established by the second appeal then in that event the latter will control over the first." As a matter of fact, there was no such conflict, for the ruling on the second appeal of necessity reaffirmed that on first appeal.

DUE PROCESS WAS DENIED.

A thing like this is shocking to the conscience. Ball's transactions with members of the Court offer the only explanation. That it is a denial of due process of law and of the equal protection of the laws, there can be no doubt.

In *Buchalter* v. *New York,* (1943) 319 U. S. 427, the Court say:

> "The due process clause of the Fourteenth Amendment requires that action by a state *through any of its agencies* must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land' " (Emphasis supplied).

See also *Hebert* v. *Louisiana,* (1926) 272 U. S. 312.

In reaching his conclusions Judge Barns ran roughshod over at least seven previous opinions of the Florida Court:

(1) *Yates* v. *Ball,* (first appeal) (1938) 132 Fla. 132, 181 So. 341, which held that a contract was proved, agency was established, and that the jury should have been permitted to pass upon the issues after the introduction of the defendant's testimony;

(2) *Yates* v. *St. Johns Beach Development Company,* (1935) 118 Fla. 788, 160 So. 197, which held that the contract was not within the Statute of Frauds;

(3) *Sanders* v. *State,* (1921) 82 Fla. 498, 90 So. 455, and *Rogers* v. *State,* (1945) 156 Fla. 161, 23 So. 2d 154,[5] which held that where a conclusion upon a material question was inevitable, except for which the judgment would have

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[5]The Rogers opinion is a recent one (1945) by the disqualified Justice Buford. As we have pointed out, the Florida Supreme Court held squarely in the chancery suit (118 Fla. 788, 160 So. 197) *that this very contract was not within the Statute of Frauds.* The point was admittedly argued on the second appeal *in this case.* That it is decisive there can be no doubt. Therefore, under the Court's own decisions it was not an open question.

been otherwise, it will be held to be adjudicated although not stated in express words;

(4) *Family Loan Company* v. *Smetal Corporation,* (1936) 123 Fla. 900, 169 So. 48, which held that on a second appeal the Court is "*without authority* to review or reverse what it has heretofore decided as the law of the case even if it were so inclined";

(5) *Provident Life & Accident Insurance Company* v. *Mathers,* (1946) 157 Fla. 661, 26 So. 2d 814, which held that the law of the case was settled on the first appeal; and

(6) *Southern Express Co.* v. *Stovall,* (1918) 75 Fla. 1, 77 So. 618, which held that "a second verdict upon the same state of facts, even though the judges might have to come to a different conclusion, is too strongly fortified by the judgment of twelve men to warrant an appellate court in disturbing it except for strong reasons."[6]

Judge Barns, in his opinion, ran the whole gamut of judicial licentiousness from misstatement of the facts to distortion of the law, digressing for exploratory sallies into realms of speculation to which the doors had been closed by the sworn testimony of witnesses and the verdict of the jury.

LINE-UP OF COURT.

This decision reversing the judgment based on the jury's verdict was 5 to 2. It was written by Circuit Judge Barns, concurred in by Justices Brown, Buford, Thomas and Adams. Chief Justice Chapman and Justice Terrell

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[6]Only once before in a hundred years of statehood has the Florida Supreme Court presumed to overthrow the verdicts of two juries.

dissented. If Justices Buford and Adams had voted to sustain the judgment, it would have been affirmed 4 to 3. If, when their disqualification was called to the attention of the Court, they had recused themselves and two circuit judges had sat in their places and had voted with the minority, the judgment likewise would have been sustained. Petitioner, however, had no such chance for a fair and impartial hearing. Two of the justices who sat in judgment on his case were already deeply committed to his opponent.

PETITIONER ACTED PROMPTLY.

The financial dealings of Justices Buford and Adams with respondent were called to the attention of the Court informally, as soon as they were discovered. The two justices declined to recuse themselves. A supplemental petition for rehearing was then filed as was done in recent case in the United States Court of Appeals for the Second Circuit, based on the disqualification of Judge Manton, which was not known at the time of the original decision. *Electric Auto-Lite Company* v. *P. & D. Mfg. Company,* (1940) 109 F. 2d 566; *General Motors Corporation* v. *Preferred Electric & W. Corporation,* (1940) 109 F. 2d 615.

In this supplemental petition for rehearing Section 4 of the Declaration of Rights of the Florida Constitution was invoked. It provides:

> "Section 4. *Courts open to everyone; remedy for wrongs.*—All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay."

Such provisions have been held to prohibit a judge from trying a cause in which he has prejudice in favor or against a party. *Castleberry* v. *Jones,* (1940) (Okla.) 99 Pac. 2d 174.

The petitioner took the position that he did not question the legal rights of the justices to have these financial transactions with his adversary. He merely questioned their rights, having done so, to sit in judgment in his case.

CANONS OF JUDICIAL ETHICS ARE A MOCKERY AND A SHAM.

Some few years ago, with the personnel of the Court practically the same, the Florida Supreme Court adopted Canons of Professional Ethics for Judges.[7] It was pointed out that the transactions by Justices Buford and Adams with the respondent, Ball, and his banks and corporations violated at least *ten* of the Canons of Ethics promulgated by the Court itself. Yet the justices refused to recuse themselves and the Court held that the suggestion of disqualification was insufficient in law and in fact. The justices then declared that they stood fairly and impartially between the parties and proceeded to reverse the petitioner's judgment.[8]

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[7]These are substantially those prepared by the American Bar Association. They appear in Volume 125, Florida Reports 522, 145 Florida Reports 763, and in the Appendix to the Florida Statutes of 1941.

[8]Even after this supplemental petition was filed and denied it was discovered that Justice Buford had made another oil and gas lease with another one of Ball's companies on land in Franklin County, and that the St. Joe Paper Company had conveyed to his wife, Mary H. Buford, property in Franklin County by deed reciting a consideration of $1.00.

THE COURT WAS NOT WILLING TO APPLY TO ITSELF RULES IT PRESCRIBED FOR OTHERS.

No court in the United States has been more ready to force the retirement of judges of inferior state courts when charged with prejudice than has the Florida Supreme Court.

In a long line of cases the Court has compelled judges of the trial courts to step aside when any suggestion of impartiality was made. It has held consistently:

> "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge."

State ex rel. Mickle v. *Rowe,* (1930) 100 Fla. 1382, 131 So. 331; *Villeneuva* v. *State,* (1937) 127 Fla. 724, 173 So. 906; *State ex rel. Davis* v. *Parks, Judge,* (1939) 141 Fla. 516, 194 So. 613; *State ex rel. La Russa* v. *Himes,* (1940) 144 Fla. 145, 197 So. 762.

And yet the Court that promulgated these high-sounding Canons of Ethics and announced these decisions held that the petition for disqualification was insufficient in law and in fact.[9]

DISQUALIFICATION IN FLORIDA IS STATUTORY.

Florida has statutes dealing with the disqualification of judges, which are applicable to justices of the Supreme

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[9]The Florida Court had held expressly that a judge who was a depositor and creditor of a closed bank was disqualified to sit in liquidation proceedings. *State ex rel. Burton* v. *Barker, Judge,* (1929) 98 Fla. 273, 123 So. 738.

Court, although they have never before been invoked against them (Sections 38.01-10, Florida Statutes, 1941). In the Court's opinion overruling the suggestion of disqualification it was not held that the petition was defective in form, although there is a veiled criticism of the petitioner for not filing it sooner. The Court said:

> "The policy of the law as expressed in the statute is that suggestion of disqualifications shall be filed before the trial and before decisions are rendered and not afterward, unless the delay is excused by good cause shown."

The suggestion of disqualification declared on oath that the facts were not discovered until after the decision and the time had expired for filing a petition for rehearing,[10] and the Court apparently forgot that the principal fact concerning Justice Adams' disqualification *could not have become known* until after the decision was rendered, namely, his borrowing $30,000.00 from the Florida Bank at Ft. Pierce on December 4, 1946, as the opinion concludes:

> "The law does not favor the substitution of a Judge or Justice in a cause after decision which essentially carries a benefit to the successful party, yet it favors judges lending themselves to promoting confidence in the Court's acts when no injustice will be worked thereby."

We dare say that the episode did not do much to promote confidence in the Court's acts in Florida.

Justice Buford, in a statement made by him concerning the suggestion of disqualification, says:

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[10]In Judge Manton's case the facts were not discovered until *five years* after the decisions. Nonetheless, the Court of Appeals (2nd) granted rehearings. 109 F. 2d 566, 641.

> "I am conscious of no bias or prejudice[11] for or against either party to this suit and there is no logical reason for anyone to assume that either exists. The record shows that my position and opinion has been consistently the same from the first appearance of this case here to date. See *Yates* v. *Ball*, 132 Fla. 132, 181 So. 341, opinion filed October 13th, 1937; *Ball* v. *Yates*, 145 Fla. 537, 200 So. 695, opinion filed May 3rd, 1940, and *Ball* v. *Yates*, opinion filed November 29th, 1946."

This statement shows that Justice Buford is disqualified and is an admission of it. It is true that he dissented on the first appeal and he had a right to do so, but when the Court overruled him and held contrariwise, he was as much bound by the decision as anyone else, and thereafter he did not have a right to maintain that his position was consistently the same from the first appearance of the case to date. If he had not been prejudiced, his position would have been in accordance with the decision of the Court. He refused, however, to be bound by it and continued his fight on Ball's behalf.[12]

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[11]It is the "unconscious" mind that is prejudiced—not the conscious one. The conscious mind is free (perhaps) from prejudice. Doubtless the witch burners were "conscious of no bias or prejudice." That afforded little solace to their victims.

[12]Compare the attitude of Justice Buford with that of Justice Holmes in *Murphy, Attorney General of Arizona*, v. *Sardell*, (1925) 269 U. S. 530, where this appears: the judgment of the lower court was affirmed on the authority of *Adkins* v. *Children's Hospital*, 261 U. S. 525, in which Justice Holmes wrote a vigorous dissent. When the same question (not the same case) came before the Court again Justice Holmes requested "that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins* v. *Children's Hospital*." For a stronger reason Justice Buford should have considered himself bound by a prior decision in the same case.

Justice Buford is a man of considerable ability. His temperament is not a judicial one. It is that of the advocate. When he takes a position in a case it is a vigorous, persistent one and one that is calculated to bring over less resolute colleagues. As the supplemental petition for rehearing shows, on second appeal he wrote an opinion that did not become the opinion of the Court but it advocated, in effect, his original position and would have overthrown everything that the Court had done. It is with extreme difficulty that the petitioner can contemplate Justice Buford's attitude being that of "the cold neutrality of an impartial judge" that the Florida Court has held that he is entitled to, particularly those of us who had the opportunity to observe his hostile attitude on the Court and had to answer his obviously partisan questions.

In *Tumey* v. *Ohio,* (1927) 273 U. S. 510, this Court held that "an accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him." That case, it is true, was one in which the salary of the judge was paid from a fund made up from fines imposed for misdemeanors. However, the principle is the same. Certainly, if it were proved that a judge had been bribed by a party, his adversary would be no more likely to receive a fair trial (if as much so) as he would in a case where the judge's salary was paid from a fund made up from fines imposed by him. Now, by the same token, if a judge has put himself under obligations to a party to a case to the extent that he cannot stand fairly and impartially between that party and his adversary, surely there has been the same denial of that character of fair trial that the due process clause contemplates.

In *Jordan* v. *Massachusetts,* (1911) 225 U. S. 176, this Court said:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

This case and *Tumey* v. *Ohio, supra,* were relied upon by the Court of Appeals, Seventh Circuit, in the case of *Inland Steel Co.* v. *National Labor Relations Board,* (1940) 109 F. 2d 9, wherein it held:

> "That a trial by a biased judge is not in conformity with due process is sustained by the authorities."

Continuing the Court said:

> "The principle is aptly stated in *People* v. *Naimark,* 154 App. Div. 760, 139 N. Y. S. 418, 420, where it is said: '* * * The first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.'
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> "And the fact that the court's judgment may be justified on the merits does not obviate the requirement of a fair trial. As was said in *Union Pacific R. Co.* v. *Syas,* (8 Cir.) 246 Fed. 561, at page 568: '* * * But no judgment is just, if not obtained by due process of law; otherwise, courts could enter judgments without trial.' * * *"

In *Whitaker* v. *McLean,* (1941) 118 F. 2d 596, the Court of Appeals for the District of Columbia reversed the District Judge for remarks made about one of the parties in a colloquy with counsel, in the absence of the jury, over his protest that he "felt no hostility to the plaintiff" and was free from bias saying that judges should not only be impartial but should "give assurance that they are impar-

tial." The Court added that its reversal of the case was more regrettable because of its impression, based on an examination of the record, that the claim on which the plaintiff sued was probably without merit.

Referring again to *Buchalter* v. *New York, supra,* so recently announced by this Court, "the due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.'"

THE COURT ATTEMPTED TO PREVENT REVIEW BY THIS COURT.

In the supplemental petition for rehearing (which was the first opportunity petitioner had for raising the point) the Court was put on notice of petitioner's contention that the participation by Justices Buford and Adams in the consideration of the case and the rendition of judgment had operated to deprive petitioner of rights guaranteed to him by the Federal Constitution. The opinion overruling the suggestion of disqualification and denying the petition for rehearing appears to be a studied effort to avoid or evade the Federal question and to circumvent petitioner's efforts for review in this Court, which, in and of itself, is an admission of the charge and a manifestation of the attitude alleged by the petitioner. In no way can a judge betray his prejudices more glaringly than by making an obvious effort to cut off a review of his ruling by a higher court. The writer of this memorandum has upon at least six prior occasions, when some phase of this litigation was before the Supreme Court of Florida, successfully resisted respondent's contention that this identical contract was

within the Statute of Frauds. On no occasion was respondent's contention sustained before. On the contrary, in every case it was either flatly rejected, or held to have been adjudicated and become the law of the case, or ignored. For the Court, after more than fifteen years of litigation, to say that this case was within the statute in an effort to prevent review by this Court, is nothing short of a fraud itself.

QUESTIONS NUMBERS 2 AND 3.

Denial of Jury Trial—Federal, State.

After the Florida Supreme Court had held on the first appeal that the plaintiff's evidence was sufficient to entitle him to go to the jury and reversed the trial judge for taking the case away from the jury, the setting aside of two successive jury verdicts thereafter rendered on the same evidence which had been held sufficient was a denial of rights guaranteed by the seventh amendment.

FLORIDA SUPREME COURT MISCONCEIVED THE APPELLATE FUNCTION.

What the majority of the Florida Court actually held on the third appeal was that they would like to believe the defendant's evidence as against the plaintiff's. They had neither legal nor moral right to do this. Apparently the Florida Supreme Court misconceived the appellate function. It was not trying the controversy between Yates and Ball. It was determining only whether the lower court in submitting the case to the jury proceeded according to law. That was its function and its only function and any other one that it assumed was sheer usurpation. *Lavender* v. *Kurn*, (1946) 327 U. S. 645.

In a still more recent case following *Lavender* v. *Kurn*, this Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury (Citing cases). Once there is a reasonable basis[13] in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra* (327 U. S., p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury (Citing cases).
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> "We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned." *Ellis* v. *Union Pacific Railroad Company,* (1946) 329 U. S. 649.

THE SEVENTH AMENDMENT.

It is quite true that the seventh amendment purports on its face to be applicable only to courts of the United States and in earlier days was held to be confined to these tribunals. However, on its face, the seventh amendment is not more applicable to the Federal Government than is the first amendment. Originally the first amendment was held to impose a restraint only on the Federal Government and not to impose on the states any restrictions respecting

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[13]In this case the Court had said, on the first appeal, that there was such a basis.

freedom of speech. *Prudential Insurance Company* v. *Cheek,* (1922) 259 U. S. 530.

Since that time, however, this Court consistently has held that freedom of speech and liberty of the press was safeguarded by the due process clause of the fourteenth amendment. *Near* v. *Minnesota,* (1930) 283 U. S. 697; *Grosjean* v. *American Press Company,* (1936) 297 U. S. 233.

In the last mentioned case the Court said:

> "But in *Powell* v. *Alabama,*[14] 287 U. S. 45, 65, 68, 77 L. Ed. 158, 168, 170, 53 S. Ct. 55, 84 A. L. R. 527, we held that in the light of subsequent decisions the sweeping language of the Hurtado Case could not be accepted without qualification. *We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment,* and among them, the fundamental right of the accused to the aid of counsel in a criminal prosecution.
>
> "*That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause* of the Fourteenth Amendment against abridgment by state legislation, has likewise been settled by a series of decisions of this court, beginning with *Gitlow* v. *New York,* 268 U. S. 652, 666, 69 L. Ed. 1138, 1145, 45 S. Ct. 625, and ending with *Near* v. *Minnesota,* 283 U. S. 697, 707, 75 L. Ed. 1357, 1362, 51 S. Ct. 625" (Emphasis supplied).

No one would think of contending today, in this Court, that freedom of speech and of the press, guaranteed by the first amendment, was not binding on the states.

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[14]*Powell* v. *Alabama* holds that the *Sixth Amendment,* insuring the assistance of counsel in criminal cases, was applicable to prosecutions in state courts by virtue of the due process clause.

As the Court said in *Murdock* v. *Pennsylvania,* (1942) 319 U. S. 105:

> "The 14th Amendment makes the 1st Amendment applicable to the states."

Now, as we have pointed out, the first amendment, on its face, is more specifically limited to federal action than the seventh, and this Court has said in the *Grosjean case, supra,* that "certain fundamental rights, safeguarded by the *first eight amendments* against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment."

In *Dimick* v. *Schiedt,* (1935) 293 U. S. 474, it was held:

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story, Const., Sec. 1779), '* * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States,* 281 U. S. 276, 312, 74 L. Ed. 854, 869, 50 S. Ct. 253, 70 A. L. R. 263."

That the first amendment is "*now* made applicable to all the States by the Fourteenth" was re-affirmed as recently as February 29, 1947, by Mr. Justice Rutledge in his dissenting opinion (concurred in by Justices Frankfurter, Jackson and Burton) in *Everson* v. *Board of Edu-*

cation of the Township of Ewing, N. J., 330 U. S. 1, citing *Schneider* v. *Irvington*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Prince* v. *Massachusetts*, 321 U. S. 158; *Thomas* v. *Collins*, 323 U. S. 516.

Conceding, for the sake of argument, that the nation or the state, consistently with the due process clause, may substitute for the jury another method of trial of common law and criminal cases, Florida has not done so: the Federal Government has not done so. It well may be doubted if either could do so as respects pending actions.

THE FLORIDA BILL OF RIGHTS WAS VIOLATED.

As far as we know, the question here presented is one of first impression. That, however, in and of itself, is no reason why it is not a sound one. Perhaps, all questions were new at one time. We dare say that when the chancellors first announced their jurisdiction to enforce specifically the performance of contracts and to reform written instruments eyebrows were lifted in the Inns of Court and the common law judges made wry faces. The Court of Appeals of New York in *Kujek* v. *Goldman*, (1896) 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 A. S. R. 670, say:

> "While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one."

The proposition is simply this. Florida was not one of the original thirteen states. Its admittance to the Union was authorized by an Act of Congress of July 7, 1838.[15]

Section 3 of the Act specifically provided for an election to be held "to devise and adopt proper means for the formation and establishment of an independent state government for the people of Florida and to form a bill of rights and constitution for the same."[16]

Section 9 provided that on the adoption of a constitution the convention should transmit an authenticated copy to the President of the United Sates, to the presiding officers of both Houses of Congress, and to the delegates from Florida, and *"if the same be ratified and approved by Congress,* the said state shall then be admitted into the Union upon an equal footing with the original states." The convention was duly held and the constitution was adopted. It contained a bill of rights consisting of twenty-seven sections. Section 6 provided:

> "That the right of trial by jury shall *for ever* remain inviolate."

Sections 10 and 15 also referred to trials by jury specifically and in terms, and other sections provided for pub-

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[15]This Act authorized the inhabitants of the territory to form a constitution and state government and to assume such name as they deemed proper, "and the said state, *when formed in the manner hereinafter provided,* shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, provided that the constitution and state government so to be formed shall be republican and in conformity to the principles contained in the Constitution of the United States."

[16]It will be noted that "bill of rights" was mentioned before "constitution."

lic trials, the right to have counsel, be confronted by the witnesses, compulsory process, etc., in accordance with bills of rights in effect, without exception as far as we know, in every state.

The constitution so formed was approved by the Act of Congress of March 3, 1845. It was found to be republican in form and Florida and Iowa were admitted into the Union.

It is safe to say that the Florida Convention would never have adopted a constitution without a guaranty of jury trial, and the Congress of the United States would never have approved such an instrument if it had, nor would it have authorized the admittance of Florida into the Union.

Instead of quoting from emphatic statements of this Court how jealously this right is guarded, we earnestly ask the Court to refer to its decision in the following cases:

Patton v. *United States,* (1930) 281 U. S. 276;
Glasser v. *United States,* (1942) 315 U. S. 60;
Jacob v. *City of New York,* (1942) 315 U. S. 752;

and the dissenting opinion of Mr. Justice Black (concurred in by Mr. Justice Douglas and Mr. Justice Murphy) in *Galloway* v. *United States,* (1943) 319 U. S. 372, 396, in support of our position that the guaranty and preservation *for ever* of the right of trial by jury was a condition upon which Florida was admitted to the Union and a breach of it violates a Federal right. Mr. Justice Black pointed out that Hamilton's view was that a jury verdict should be reexamined, if at all, only by a second jury, and yet the Florida Court, after deliberately and point-blank holding that the plaintiff's evidence made out a case that entitled him to go to the jury, calmly tossed two jury verdicts out of the window.

This Court reversed the judgment of the Supreme Court of Missouri for doing this identical thing. *Lavender* v. *Kurn*, (1946) 327 U. S. 645.

This decision was called to the attention of the Florida Court but it paid it no more heed than it would have the judgment of a Hottentot tribe.

That petitioner did not receive a fair trial in the Florida Supreme Court is demonstrably clear. That this Court is his only hope of getting justice is not less clear.

Respectfully,

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